

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

DRISCOLL STRAWBERRY ASSOCIATIONS, INC.,

Employer

and

Case No. 31-RC-8803

TEAMSTERS UNION LOCAL 381,

Petitioner

DECISION AND DIRECTION OF ELECTION

On March 25, 2010, Teamsters Union Local 381 (“the Petitioner” or “the Union”) filed petition 31-RC-8803 under Section 9(c) of the National Labor Relations Act which, as amended at the hearing, sought to add to an existing bargaining unit employees in the classifications of Coordinators, Quality Assurance Inspectors, Shipping Clerks, Auditors, and Samplers, employed by Driscoll Strawberry Associations, Inc. (“Driscoll” or “the Employer”).

On April 8 and April 16, 2010, a hearing was held on the referenced petition. The sole issue presented at the hearing is the supervisory status of four coordinators. The Employer seeks to exclude the Outbound Coordinator, the Operations/Outbound Coordinator, the Packaging Coordinator, and the Inbound Coordinator from inclusion in the existing bargaining unit on the basis that they are supervisors within the meaning of Section 2(11) of the Act.

The Union currently represents an existing unit which is comprised of employees in the following classifications: floor help, seasonal floor help, fork lift warehouseperson, and maintenance, excluding all other employees, guards, and supervisors as defined in the Act, as amended, employed at the Employer’s Precooling Plant located in Santa Maria, California (“the

existing unit”).¹ The Employer and the Union are parties to a collective bargaining agreement in effect from February 7, 2007 through February 6, 2011. The Union seeks to add employees in the classifications of Coordinators, Quality Assurance Inspectors, Shipping Clerks, Auditors, and Samplers to the existing unit through an *Armour-Globe* or self-determination election.² The Employer does not oppose this petition for a self-determination election.

For the reasons set forth, I conclude that

I. FINDINGS

A. HEARING OFFICER RULINGS: The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.³

B. JURISDICTION: The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.⁴

C. LABOR ORGANIZATION: The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

¹ The above-description of the existing bargaining unit is construed from Section 7 of the collective bargaining agreement between the Union and the Employer in effect from February 7, 2007 to February 6, 2011.

² See, *Warner-Lambert Co.*, 298 NLRB 993 (1990); *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping*, 3 NLRB 294 (1937).

³ I deny the Employer's motion to dismiss the petition due to supervisory taint as it is inappropriate to litigate taint in a representation case decision. The Board's *Casehandling Manual, Part Two, Representation Proceedings*, in Section 11184.1 states that “[i]f a party seeks at the hearing to introduce evidence of alleged fraud, misconduct, supervisory taint, or forgery in obtaining the showing of interest, the line of questioning should not be permitted” and, at Section 11184, “[a]rgument at a pre-election hearing on the adequacy of a showing of interest is not permitted.” Attempts by parties to attack the showing of interest as a means of obtaining dismissal of the representation petition have been regularly rejected by the Board. *A.B.C. Liquors, Inc.*, 227 NLRB 1582 (1977). See also, *Georgia Kraft Company*, 120 NLRB 806 (1958). I also note that the Employer, in making this motion, referred to the filing of an unfair labor practice charge against the union alleging a violation of Section 8(b)(1) of the Act. On May 13, 2010, the Regional Director approved the charging party's request to withdraw that charge.

⁴ The Employer, Driscoll Strawberry Associates, Inc., is a California corporation with a place of business in Santa Maria, California where it is engaged in the distribution of strawberries to retail distributors. During the past 12 months, from its Santa Maria Facility, the Employer purchased and received goods, supplies, and materials valued in excess of \$50,000.00 directly from suppliers located outside of the State of California.

D. QUESTION CONCERNING COMMERCE: A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

E. The following employees of the Employer constitute an appropriate Voting Group (“the Voting Group” or “the petitioned-for unit”) for inclusion in an existing unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: Coordinators, quality assurance inspectors, shipping clerks, auditors, and samplers employed by the Employer at its Santa Maria, California Facility.

EXCLUDED: Office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The parties have stipulated that the Voting Group is an appropriate unit. The Petitioner seeks to add these employees to the existing bargaining unit by way of a self-determination election. For the reasons noted below, I find that the Packaging Coordinator and the Operations/Outbound Coordinator are not supervisors within the meaning of Section 2(11). I am, however, unable to conclude from the record whether the Inbound Coordinator and the Outbound Coordinator have supervisory authority within the meaning of Section 2(11) of the Act; therefore the individuals who occupy these two positions will be allowed to vote subject to challenge. The number of employees in the Voting Group ranges, depending on the season, up to 18 employees for whom there has been no prior history of collective bargaining.

II. FACTS

A. Issue Presented

The issue presented in this case is whether four classifications, the Inbound Coordinator (“the IC”), the Packaging Coordinator (“the PC”), the Outbound Coordinator (“the OC”), and the Operations/Outbound Coordinator (“the OpC”), are supervisors within the meaning of the Act.⁵ It is the Employer’s position that they are supervisors and thus should be excluded from the petitioned-for unit while the Petitioner Union contends that they are not supervisors and thus are appropriately included in the petitioned-for unit. In analyzing the issues in this case, I will first provide a brief overview of the Employer’s structure and operations. I will then specifically address the issue presented.

B. Overview of Structure and Operations of Driscoll

Driscoll Strawberry Associates, Inc. is in the business of developing proprietary strawberry, raspberry, blackberry, and blueberry varieties. Driscoll contracts with growers to grow the fruits that Driscoll sells and distributes. The Employer operates two shifts each day. The Distribution Center in Santa Maria (“the Facility”) is open from 7 a.m. to 7 p.m. during the light season, and 6 a.m. to 2 a.m. during the peak season. The day or first shift is from about 7 a.m. until 4 p.m. and the night or second shift is from 1 p.m. until 11 p.m. The light season spans from February through the first week of May and the peak season ranges from after the first week of May through July. August to November is again considered the light season. The off season is December through the first week of February. While the Facility is open during the off season, there is almost no activity. The petitioned-for unit includes 18 employees during the peak season whereas during the light season the petitioned-for unit would include about four

⁵ The Employer employs other individuals with the title “coordinator” but the Employer does not contend that any other coordinators are supervisors within the meaning of the Act.

employees.⁶ The number of employees in the petitioned-for unit increases gradually during the light season.

C. The Hierarchy at the Facility

The Vice-President/General Manager of the Employer's Southern Region oversees the District Manager of the Santa Maria District who oversees the Santa Maria Distribution Center Manager ("DCM").⁷ The DCM is responsible for running the daily and yearly operations of the distribution center, working Monday through Friday and some Saturdays from about 7:30 a.m. until 5 p.m. The DCM is responsible for the budget as well as hiring and firing people at the Santa Maria Facility. He spends about 80% of his time at the Facility in his office and about 20% on the floor. The positions of Inbound Supervisor ("Inbound Supervisor") and Outbound Supervisor ("Outbound Supervisor") report to the DCM. Between the first day and the second day of the hearing the Inbound Supervisor was separated from employment with the Employer and the Outbound Supervisor was demoted to Coordinator. Based on the departures of the Inbound and Outbound Supervisors, as of April 16, 2010, the four coordinators at issue at the Santa Maria Facility report to the DCM. The DCM testified that he is presently doing what the supervisors had been doing and that he plans to replace the two supervisors in the next season.⁸ Prior to the departures of the supervisors, the Inbound Coordinator and Packaging Coordinator reported to the Inbound Supervisor and the Operations/Outbound Coordinator and Outbound Coordinator reported to the Outbound Supervisor. The Coordinators work with employees in the existing bargaining unit as well as employees in the petitioned-for bargaining unit.

D. The Operations

⁶ The number of employees in the existing unit fluctuates from 0 to 30 employees.

⁷ The Southern Region is comprised of Santa Maria, Oxnard, and Baja, California.

⁸ Throughout the record, there is testimony regarding the roles of the inbound and outbound supervisors. Based on the testimony of the DCM that he is filling in for these supervisors while their positions are vacant, I will assume that the work formerly done by the Inbound Supervisor and the Outbound Supervisor is now done by the DCM.

The Facility is divided into the inbound department and the outbound department. The inbound department of the Facility receives the merchandise from the field drivers in the receiving area.⁹ When the field trucks arrive from the field, a Driscoll employee referred to as the receiver goes out to meet the driver.¹⁰ The field driver then hands the receiver a document that contains a description of quantities and varieties of strawberries the field truck is delivering to the Facility. The receiver verifies the count and inputs this information into the system. A forklift driver, also referred to as an off-loader, then removes the pallets from the truck, tags the pallets, and brings them to the Quality Assurance Rollers.¹¹ The Quality Assurance rollers automatically transport the pallets to the QA Inspectors who check the pallets to verify the quality. The off-loader continues this process until the truck is empty and then waits for the next truck to arrive to be offloaded. On the occasions when several trucks arrive at the same time and there is a backup, other employees, if available, will assist the off-loader. Either the IC or supervisor will tell another employee to assist the off-loader. The record contains no detail as to how this employee is selected or directed to assist the off-loader. According to the IC, the off-loader knows that it is his assignment to unload a particular truck based on schedules posted at the Facility. At the time of the hearing, the inbound department employed only one off-loader.

Thereafter, a put-away/forklift driver takes the berries off of the rollers and either places the berries in the consolidation area or takes them to the precooling tunnels. Once the pallets have been consolidated such that they are full, Driscoll employees move the pallets to the precooling tunnels where the berries stay for between 1½ and 2 hours. Once the berries are cooled, they are taken out of the tunnel by a forklift driver, referred to as a tunnel driver, and

⁹ The Field Drivers are not Driscoll employees.

¹⁰ The Receiving Clerk is a Driscoll employee.

¹¹ This forklift off-loader classification is part of the existing bargaining unit.

brought to a staging area.¹² Once in the staging area, the berries are either taken to be “tectrolled” or taken by a forklift driver to the consolidation area for shipping.¹³ A loading team then prepares the customer orders, which are loaded by Driscoll employees into the trucks of the Employer’s customers in the shipping area of the Facility.

This above-described process was overseen by the Inbound Supervisor and Outbound Supervisor until mid-April 2010. The Inbound Supervisor spent about 80% of his time in his office. The Packaging Coordinator (“PC”) and Inbound Coordinator (“IC”) reported to the Inbound Supervisor. Prior to his separation from the Employer, 12 employees reported to the Inbound Supervisor and it was expected that up to 20 employees would report to him once the Facility reached the peak season. The Outbound Department was supervised by the Outbound Supervisor who was responsible for the proper shipping of the product to Driscoll’s customers by overseeing the cooling, the preparation of the cargo, and the loading and transportation of the merchandise. The Outbound Supervisor had an office in the Facility and spent about 90% of his time in the office. The Outbound Coordinator and the Operations/Outbound Coordinator reported to the Outbound Supervisor.

I will now address each of the disputed classifications.

E. Facts Common to the Four Coordinators at Issue

The record established certain common facts for the four disputed coordinator classifications. Coordinators are eligible for bonuses, which are based on the coordinators’ wages and positions at the end of the year. The bonuses are paid during the first quarter of the following year. Personnel eligible for bonuses include the HR representative, all coordinators, supervisors, the DCM, and the individuals ranking above the DCM. Although there was testimony that all

¹² The Forklift Driver is a Driscoll employee and is a member of the existing bargaining unit.

¹³ Tectrol refers to a chemical applied to the fruits to increase shelf-life.

coordinators received bonuses for the year 2009, it is unclear whether this includes the coordinators who are not at issue in that they are not alleged to be supervisors. The other classifications in the existing and petitioned-for units are not eligible for bonuses. According to the OpC, he has been told that the bonus is tied to his work responsibilities but the coordinators all get the same bonuses “no matter what [the] review says.” There was no evidence regarding when and how this was communicated to the OpC. The OpC has received a bonus each year except for the year he was “in the union.”

According to the DCM, coordinators must ask him for permission to do union work and they are not allowed to do any union work.¹⁴ The record does not contain any details of how or when this direction was communicated to the coordinators.

There are instances when a coordinator is at work without a supervisor being present. According to the DCM, in 2009, during the second shift, the OC worked without a supervisor present from about 5 p.m. until 11 p.m. “or up to” 2 a.m. throughout the year. In 2010, the OC has worked without a supervisor present from 7 a.m. until 1 p.m. and the IC has worked one Sunday without a supervisor present. The coordinators have offices. The IC and the PC shared an office with the Inbound Supervisor while the OC and OpC shared an office with the Outbound Supervisor and the Shipping Clerks.

Scheduling Employees

The work schedule listing the hours to be worked by all of the employees including start times, breaks, lunches, and ending times, with the exception of supervisors, is posted next to the time clock in the Facility.¹⁵ The DCM or Supervisors prepare the schedules and post them on a weekly or daily basis. According to the DCM, coordinators and supervisors can make

¹⁴ “Union work” refers to work done by employees in the existing bargaining unit.

¹⁵ The schedules at times lists the supervisors but this varies as the supervisors work set schedules.

recommendations about scheduled hours and the DCM routinely follows these recommendations. The record does not contain details as to when coordinators have made recommendations regarding scheduling upon which the DCM had relied.

Evaluating Employees

As employees at the Facility do not receive evaluations, the coordinators are not involved in evaluating employee performance.

Hiring, Discipline, and Discharge¹⁶

The IC, PC, OC, and OpC do not have the authority to either hire or discharge employees on their own. According to the DCM, in his two years as DCM, there has not been a discharge recommended by the IC, PC, OC or OpC.

The IC, PC, OC, and OpC are involved in the Employer's process of disciplining employees. The Employer uses a progressive discipline system for the existing unit employees. Causes for discipline are articulated in the Employer's Standards of Conduct, which is provided to the managers, supervisors, and the IC, PC, OC, and OpC. This document is used as a guideline in the process of disciplining an employee.

The DCM wants coordinators to be present for disciplinary meetings in the event that they need to answer the employee's questions. Sometimes the DCM conducts the meeting because a coordinator has recommended it, or to answer an employee's questions. The DCM asserted that it is not his practice to conduct an independent investigation when a coordinator recommends discipline but rather he relies on the recommendation.

Granting Time Off

The DCM testified that he allows coordinators to grant time off without checking with supervisors or with him. The Employer uses a Time Off Request Form. Employees write on the

¹⁶ These facts are in addition to the facts I will describe for each specific coordinator classification *infra*.

Time Off Request Form if they are going to be arriving late on a certain day, to request a day off, or to leave early on a certain day. The form does not include a signature line for coordinators but does have a space for the supervisor's signature. While the DCM testified that he allows coordinators to approve time off requests, he provided no details or examples of this. Further, the DCM testified that he has given the order that unit employees must speak with their supervisor or coordinator if they want to leave early and that the coordinator needs to send an email directed to everybody that one specific person will be missing. The record does not contain any details of how this message was communicated to unit employees or to the coordinators.

Authorizing Overtime

According to the DCM, the OC, OpC, the PC, and the IC have the authority to authorize overtime. However, the record does not contain any detailed evidence regarding their authority to authorize overtime or evidence that the DCM or other supervisor or manager communicated this authority to any of the disputed coordinators. Moreover, by an email dated March 24, 2010, the DCM notified all supervisors and coordinators that "NO O.T., during week days with our [sic] previous approval by Supervisor and/or Manager."

Promotions

Promotions from floor help to forklift driver are available in the Facility. All of the unit employees have been trained or certified to drive the forklifts. When a forklift driver position becomes available, the coordinators can recommend a specific person to move from the floor help position to the forklift driver position. The DCM recalled this happening twice during his time at the Employer. On those two occasions, the coordinators made recommendations, which were accepted. However, the record does not contain any details as to the process by which the DCM accepted the coordinators recommendations nor does the record reveal which coordinators made recommendations that were accepted or whether the DCM conducted an independent

investigation.

Wages

On average employees in the current bargaining unit make about \$12.00 per hour and coordinators make about \$14.50 an hour. No unit employees earn more than the coordinators. The record does not contain any detail as to how much each individual coordinator earns and does not include any distinctions between what the contested coordinators earn as compared to the uncontested coordinators in the petitioned-for unit.

Staff Meetings

The Employer holds weekly staff meetings on Monday afternoons for about an hour to two hours. These meetings are attended by supervisors, the IC, the PC, the OC, the OpC, and HR representatives. The topics covered at these meetings include the previous week's metrics, the operations, scheduling, layoffs and recalls, and overtime.¹⁷ The IC is responsible for ensuring that the inbound cycle time is met. The inbound cycle time is the time allotted for the product to be received and placed inside of the cooler. There is also an outbound cycle time, which is the time allotted from the arrival of the customers' trucks to the time the trucks are loaded. The OC is responsible for meeting the outbound cycle time. The record contains no detail as to how the IC and the OC are responsible for meeting these goals or whether discipline ensues for failure to meet a goal.

Safety Committee Participation

The IC is the safety coordinator for the distribution center. The IC schedules the safety meetings, prepares the agenda for the safety meetings, and communicates the safety issues to employees at safety meetings. The safety committee is comprised of the DCM, four supervisors,

¹⁷ According to the DCM, he has held one or two meetings attended only by supervisors since February 2010 at which coordinators were not present.

the IC, PC, OC, OpC, and hourly employees. At the safety committee meetings, the attendees discuss safety issues including incidents that have occurred at the Facility.

Training

The PC, IC, OC, and the OpC have attended training programs held by the Employer. These trainings take place three-to-four times a year and each lasts for one-to-two days. The trainings have covered topics including sexual harassment, leadership, proper delegation, and disciplining employees. The PC has not been trained in documenting employee conduct but has attended training with managers, supervisors, and other coordinators on the issues of safety, and sexual harassment. The IC attended training on sexual harassment, motivating employees, and filling out incident reports, but had not had training on how to discipline somebody. The OpC did not recall being trained on documenting employee performance.

Recall of Employees

Because the work at the Santa Maria Distribution Center is seasonal, employees are laid off and recalled based on the amount of work. Generally, all of the unit employees with sufficient seniority are recalled after they are laid off from the previous season. The DCM will decide who to recall based on the recommendation of a coordinator or a supervisor. According to the DCM, there have been situations in the last two years when 4-5 unit employees without seniority have been laid off and not recalled based on the recommendation of the OC. The DCM testified that he generally does not do his own investigation before he accepts the OC's recommendation. The record contained no detail regarding these recommendations. When discussing who was to be recalled, according to the OC, the coordinators did not express their opinion as to who should be recalled and who should not be. Rather, the coordinators gave input as to what they thought of the people being recalled and where they would be best positioned, i.e. in the inbound or outbound department. According to the OC, management did not follow all of

the coordinators' recommendations. Other than conclusory statements, the record contained no detailed evidence regarding the coordinators' roles in recommending the recall of employees.

Transfer of Employees

Employees can be transferred between the inbound and outbound departments on a permanent or temporary basis. The IC, PC, OC, and OpC may request that employees be transferred by asking the DCM, who normally approves the transfer. The record contains no detail or evidence of instances in which the coordinators at issue in this matter have recommended a transfer and the DCM has approved such a transfer without conducting his own analysis.

F. The Inbound Coordinator (IC)

The IC works from about 8 a.m. to 5 p.m. The IC is an hourly-paid employee who works between 36-40 hours during the slower periods and between 40-50 hours during the peak season. At the time of the hearing, since the Inbound Supervisor was no longer employed, the IC was reporting directly to the DCM. The IC oversees the process by which the Facility receives the merchandise, assigns a barcode to the merchandise, offloads the trucks, passes the merchandise to the quality assurance area, and moves the merchandise from the quality assurance station to the consolidation area or tunnels. The IC works with a forklift driver to receive the merchandise and to move it through the Facility. The IC also works with the put away drivers to move the berries from the quality assurance area to the tunnels. The IC spends his time on the floor in the receiving area while at work.

The IC has, in the past, authorized overtime. The IC recalled doing so sometime last year. However, the IC testified that he had not authorized overtime within the last three months prior

to the April 2010 hearing.¹⁸ The record contained no evidence regarding whether there are any policies in place that govern the granting of overtime or what steps he took to authorize the overtime; nor did it include any detail regarding the IC's authorization of overtime.

According to the IC, since the discharge of the former Inbound Supervisor which occurred between April 8 and 16, 2010, employees in the classifications of receivers and consolidators have come to him when there was something wrong with the counts in a pallet and he tried to fix the problem. There was no additional detail in the record as to how the IC fixes problems raised with him.

On one occasion, in May 2009, the IC witnessed an employee taking more time than needed to complete the task of filling up the cooler with fruit. The IC talked to the employee and told him a better way to do the job. The employee agreed yet continued to do the task "his own way." The IC then went to speak to the supervisor and told him "Hey, I spoke to this guy and he is still doing it -- still doing whatever he wants"; the supervisor responded "Okay, go ahead and write him up." The IC then went to speak to the HR Administrator who gave the IC the form and told him how to fill it out. Subsequently, the IC, the DCM, the HR Administrator, and the employee met in the HR Administrator's office. At this meeting, the IC and the DCM spoke to the employee about what had happened. The Disciplinary Action Form was signed by the DCM where it provides for the supervisor's signature and by the IC on the line for the witness' signature. The IC testified that this example was the only write-up that he took part in.

The IC sees his role as ensuring the product flow is constant. In a typical day, the IC might find that pallets are building up; he may then step in to ask that the tunnel put-away employee stop running pallets and start stacking and putting away pallets first. The IC may also

¹⁸ The IC also testified that the Facility had not opened until March 2010 and that he was referencing prior years in his testimony regarding the last three months.

have one of the consolidators, if the employee is familiar with receiving, assist the receiver if things get backed up in receiving. Once receiving is caught up, the consolidator would go back to his work. Also, if the consolidation area looks messy, the IC will ask employees to clean the area. According to the IC, “everybody pretty much knows what to do . . . there are times that we don’t even have to tell them to clean -- they will see stuff on the floor and they will start picking it up and they do it on their own.” There was no evidence that the IC is held accountable for the performance of the employees he oversees. If an employee needs to leave work early, the employee would go to the Supervisor rather than the IC.¹⁹ The employee must fill out a request form that is turned into and signed by the Supervisor.

G. The Packaging Coordinator (PC)

The PC is an hourly employee who works from about 6:30 -7 a.m. to 3:30 p.m.-4 p.m. Monday through Friday and from about 7 a.m. until 2 or 3 p.m. on Saturdays. He has held this position for two seasons. At times, the PC has been the only coordinator present from 6:30 a.m. until 10 a.m. The PC is responsible for the count of the shipping inventory, ordering shipping materials and providing the shipping materials to the growers. The PC inventories the receiving and exiting of the clamshells, the packages into which the strawberries are placed, containing the Driscoll logo from the distribution center as well as shipping materials at the Facility. The PC has an office where he keeps his paperwork and spends about 50-60% of his day at his desk. He also makes sure that the issuing tickets for the clamshells picked up by customers are correct. The PC works with forklift drivers and coordinators.

Currently, the PC works most closely with one full-time and one part-time employee. These employees take written orders from the field drivers in which they request a certain amount of clamshells for their next day of work, create an order ticket on a wireless computer,

¹⁹ The IC testified that he is not able to authorize overtime and that a supervisor usually does that.

retrieve the product, and load the clamshells onto the truck. When the receiver encounters an issue with the inventory, the receiver will go to the PC. The PC works in the same office with the consolidator so if the consolidator is not present, an employee may ask the PC for assistance with inventory issues that arise. For example, if an employee has an issue with the SKU number, the PC will pull up the computer entry for the particular pallet and will edit the entry to fix the problem. Sometimes the PC works with off loaders when they have a problem creating a receipt for the empty clamshells.

The forklift drivers have set schedules with set times to take lunch. The PC does not authorize or direct the forklift drivers as to when to take their breaks. According to the PC, the Inbound Supervisor created the schedule which includes all employees and the times for “time-in, lunch, time-out, and then at the end of that, it has what times to take . . . break[s].”

If another supervisor or coordinator from a different department needs an extra person from his department, the PC would ask the former Inbound Supervisor if the employee could go to another department. The supervisor would then decide whether the employee could be loaned to another department. The PC cannot make this decision himself. The PC does not inspect the work of the employees he works with because “[t]here is nothing really to inspect.” If an employee needs to go home, the employee would go to the supervisor, not the PC. The PC does not have the authority to grant an employee’s request to go home early on his own. The DCM testified that the PC has authority to authorize overtime but gave no details or examples. However, the PC testified that he cannot grant overtime and would go to his supervisor to get approval for overtime.

The PC will sometimes do the work done by the forklift drivers and some of the uploaders. According to the PC, the day before he testified there had been an ammonia leak and some of the employees were sent home such that there were not enough employees to do the

receiving. Therefore, the PC had to do receiving work himself. According to the PC, it is not unusual for him to jump in and help to do work done by employees in the existing bargaining unit. In fact, the PC testified that he has done the work of employees in the existing bargaining unit more than twenty times within the past two seasons. According to the PC, he has seen other coordinators pitch in and do some of the work done by employees in the existing bargaining unit.

Sometime during the time that he held the position of PC, the PC went to Jalisco, Mexico to show forklift drivers and loaders the processes followed at the Driscoll plant in California.²⁰ The record contains no detailed evidence regarding the PC's involvement in the disciplinary process.

H. The Outbound Coordinator (OC)

The OC's areas of responsibility include the preparation of the product, which includes the tectrolling and packaging of the product, as well as the assigning of appointments to customers and the loading of the merchandise onto customers' trucks. The OC works with forklift drivers, the tectrol team,²¹ the loading team, and the shipping clerks.²²

The OC started as the daytime outbound coordinator on March 8, 2010. Prior to March 2010, the OC had worked on the night shift for three years. He works from 8 a.m. to 5 p.m. When moving the OC to the dayshift, the DCM told the OC that he needed to have a supervisor on-site for all shifts so he was going to have the Inbound Supervisor as the morning shift supervisor and the Outbound Supervisor as the night shift supervisor. The DCM also told the OC that the OC would be in charge of the dayshift operation loading windows. The term "loading windows" refers to the average amount of time the Employer promises its customers it will take

²⁰ These are Driscoll employees.

²¹ Five employees are on the tectrol team under the OC.

²² The shipping clerks are not members of the existing bargaining unit. Two shipping clerks work with the OC.

from arrival to departure from the Facility. The record did not contain additional detail regarding how the OC would be in charge of the loading windows.

When the OC arrives at work, he clocks in and looks inside of the cooler. He then goes into the outbound office and checks the inventory by logging onto the computer and verifying that the inventory numbers match from the night before. On a slow day there are about 20-25 orders and on heavy days, 40-50 orders.²³ After reviewing the numbers, the OC meets with the shipping clerk to discuss the schedule for the day. The OC testified that the shipping clerks “pretty much know what they’re doing on a daily basis.” The loading team arrives at 10 a.m. and the OC ensures that they are doing their jobs properly. There was no detail in the record regarding how the OC ensures that employees are doing their jobs properly. The loading team employees will speak to the OC if they have a problem with an order or if they have a concern about another employee’s performance.

The OC wrote an email dated January 15, 2010 to the Director of Human Resources in response to his request that the OC summarize his duties over the last three years. The OC wrote, in this email, that he oversaw the put-away process to ensure that the berries that first arrived at the Facility were the berries to first exit the Facility. The OC’s other duties as he described in this email included: managing the movement of the berries from the time they entered the cooling tunnels to the time the drivers received the berries; managing outbound employees’ activities; handling employees’ questions, requests, and issues needing immediate attention; managing schedules; managing the outbound office; making decisions on product movement; dealing with phone calls from buyers, dispatchers, sales representatives, and truck drivers;

²³ Loading Orders are prepared by the OC or by one of the shipping clerks. Loading Orders include the customer’s name, the truck onto which the merchandise is going to be loaded, and the quantity of merchandise that has to be prepared for each load. When a driver arrives at the Facility, he provides a Driscoll employee with a work order. The Driscoll employee then enters the work order number into Driscoll system which tells the shipping clerk what product and how much product to prepare for the customer. The merchandise to be prepared for any particular order is determined in advance somewhere in the office.

managing safety of persons on-site; ensuring that employees handle the product correctly and safely; ensuring that truck drivers follow rules and regulations while on Driscoll's premises; managing the movement of the export product and any other special request orders; coordinating the arrival of fruit with the export sales team and local QA; coordinating with Inbound to ensure swift yet effective movement of product in and out; managing Inbound movement and personnel after Inbound Coordinator leaves for the day; assisting in the Plant Distribution; answering questions from growers; giving growers updated allocations; issuing plants per allocation per grower; overseeing the arrival and put away of plants; and counting inventory to be sure that the physical product matched the information in the system. The OC testified that his duty to "manage the movement of the berries from the time they enter the cooling tunnels until the time papers are signed by driver" had been taken from him around the time he wrote his email to the Director of Human Resources in January 2010.

According to the OC, his responsibilities changed after a February or March 2010 meeting during which the coordinators were told by the Director of Human Resources that "[y]ou are not supervisors. You are not required to do what the supervisor does. You are coordinators and you need to handle that title accordingly."²⁴ The OC's testimony regarding how his duties had changed after his meeting with the Director of Human Resources did not include any details as to when he was told that his specific job duties had been removed from him. According to the OC, he currently works with the employees inside the cooler to make sure the trucks are loaded correctly. The OC also loads trucks himself and, at times, drives a forklift. The OC has driven a forklift either at the direction of his supervisor or once he communicates to a supervisor that he needs to help out. According to the OC, he drives a forklift himself three to four times a week and spends about 60-70% of his time in the office doing paperwork.

²⁴ Other witnesses placed this meeting on March 10, 2010.

To accomplish his duties, the OC works with the Loading Windows Coordinator/ Shipping Clerk and the Loading Window Clerk. The Shipping Clerk assigns loading appointments to Driscoll's customers. The Loading Window Clerk answers phone calls from customers, dispatchers, drivers, and salespeople and also prepares paperwork for the packing manifest. The OC directs the Loading Window Clerk's work by "tell[ing] her about her activities and hours and the paperwork that is necessary to do the loading functions." The record contained no detail regarding what the OC meant by "telling her about her activities and hours." According to the OC, it is the Shipping Clerk who tells the forklift drivers how much merchandise to load based on information already contained in the Driscoll computer system.

The OC also works with loading teams.²⁵ Each loading team is made up of two employees who prepare and load the orders onto the customers' trucks. One member of the team drives a forklift and the other works on the floor. They prepare the loads in the staging area and load them onto the trucks from the shipping dock at the Facility. The OC directs the loading team's work by giving them the loading paperwork to prepare the orders and by telling them to prepare the specific orders and to load specific trailers. The Employer currently employs three loading teams comprised of six people. Two of the loading teams work on the morning shift and overlap with the night shift and one team works on the night shift.

The OC also works with forklift drivers who are responsible for taking the merchandise from the tunnels to the staging area or to the tectrol area. The Employer currently employs two forklift drivers to do this work during the day shift. These forklift drivers are members of the Employer's tectrol team with one feeding the tectrol machine by picking up the pallets and dropping them on a conveyor belt and the other taking the pallets after they have been tectrolled and moving them to the staging area for shipping. In addition to the forklift driver members of

²⁵ These employees are members of the existing bargaining unit.

the tectrol team, there are three additional employees on the tectrol team who apply the tectrol to the product.²⁶ The OC directs them to pick out the merchandise for the tunnel area or the staging area and ensures the tectrol is applied properly.

It is sometimes necessary for the employees working under the OC to work overtime. According to the DCM, the OC approves overtime and informs the Outbound Supervisor that he has granted the overtime but does not need approval to do so. The record contains no evidence of instances in which the OC approved overtime or any details regarding the procedure by which the OC were to grant overtime. There is also no evidence of the DCM communicating to the OC that he has the authority to authorize overtime. The OC denies that he authorizes overtime.

The OC testified that there is not much supervision of the forklift drivers and tectrol teams, that if there is an issue they come to the office and report any problems. According to the OC, “[e]verybody knows their place, they’ve been there a long time and we have a shop steward who handles some of those employees.”

According to the DCM, on one occasion, a job was done incorrectly and the OC received a write-up for that job. However, “[o]ther than that one, pretty much [the OC] always completes his tasks very well.”²⁷ The record was unclear as to whether the OC was written up for his own performance or for that of the employees he oversees.

In an email dated March 16, 2009, the OC sent to the DCM and the Outbound Supervisor a schedule for outbound employees in March 2009, a contact list for the outbound employees, and a page of outbound rules and expectations for the 2009 season. According to the OC, another coordinator, the Operations/Outbound Coordinator (“the OpC”) created the documents attached to the e-mail. According to the OC, these rules and expectations had been communicated to the

²⁶ These employees are also part of the existing bargaining unit.

²⁷ The write up itself was not made part of the record.

Outbound Coordinators for them to reduce to writing to give to employees; however, there is no evidence that these rules and expectations were provided or communicated to employees.

In an email dated April 4, 2009, the OC sent to the former Outbound Supervisor a summary of an earlier tailgate (the term tailgate refers to a meeting attended by employees to discuss issues at work) with new associates; it included topics he had added to the meeting regarding no-cell phone usage in the cooler and no horse-playing at any time.

On May 20, 2009, the OC wrote an email to the Outbound Supervisor, the OpC, the DCM, and others, describing a discussion he had that night with “[his] guys” in which he went over cell phones in the cooler, staying in their work stations, and the length of lunches and breaks. According to the OC, he sent this email to confirm to the Outbound Supervisor and the DCM that he had done what they had asked him to do.

On July 1, 2009, the OC sent an email to the Outbound Supervisor, the HR Representative, and the DCM, recounting an incident in which the OC had spoken to an employee about his attitude and conduct at work and sent the employee home. The OC wrote:

FYI . . . Yesterday at around 6:00 pm I had to again go out and speak to [an employee] about his attitude and horsing around, also not staying focused on his job responsibility’s [sic] I watched him for the next 45 min. . . with the same results so I went to tell him this was the final time I was going to talk to him next time I would just send him home. . . he gave me a smart answer back and so I told him to go home and figure out if he is serious about being here, so he left at 7:00 pm . . . I have not had any problems with [this particular employee] all season except these last few days so I gave him his verbal and discussed the situation with [Outbound Supervisor] today and he will follow up with the rest.

The OC confirmed in his testimony that his July 1, 2009 email accurately described what he told the employee on June 30, 2009. The day after the OC sent the employee home, the employee received a verbal warning signed by the Outbound Supervisor, the DCM as a witness, and the employee on July 1, 2009. The OC did not sign the verbal warning. The warning was provided to the employee at a meeting also attended by the DCM, the Outbound Supervisor, and the OC.

According to the DCM, he did not conduct an investigation prior to issuing the verbal discipline to the employee on July 1, 2009 and, as evidenced by this incident, the OC has the authority to send an employee home for disciplinary purposes without approval from more high-ranking individuals.

On July 3, 2009, the OC recounted in an email to the Outbound Supervisor and the DCM a quick meeting he had with the tectrol team during which he told them that they were expected to move more quickly. The OC testified that he relayed this message pursuant to his supervisor's instruction.

By email dated July 21, 2009 and addressed to the DCM, the Outbound Supervisor, HR Representative, and the Inbound Supervisor, the OC described a conversation he had with an employee in which he told the employee that he had mispunched in and that this could result in discipline. According to the OC, he sent this email after he "was told by [the HR Administrator], who checks the timesheets, that we needed to discuss with [two particular employees] their mis-punches. They were having too many mis-punches that [one employee] was clocking in too early, which was resulting in penalty pay and that had to be addressed."²⁸

On about August 10, 2009, the HR Administrator sent an email to the then-Outbound Supervisor and the OC regarding a request for days-off form. As a routine matter, the HR Administrator receives requests for days-off forms after final signature. According to the HR Administrator, a manger or supervisor's signature is required before time off can be given to an employee. In this email, the HR Administrator writes regarding a forklift operator, that "[he] will need a disciplinary action for excessive call ins and [another employee] will need a verbal for coming in late. We need to take care of this today please. I will email you a print out of his call ins." The HR Administrator testified that she gave the Outbound Supervisor and the OC the

²⁸ The record is not clear as to whom "we" refers.

information about the needed disciplinary action and “they take it from there.” The record contains no detail regarding what steps were taken next after the Outbound Supervisor and OC received this email.

By email dated September 14, 2009, the OC wrote to the DCM that he wanted to get the employees together with the OC and the IC to talk to the employees “about what is expected while they are clocked in at work because [he had seen] a few of these guys that can step it up more and do more than they are now.” According to the OC, the DCM never responded to this email and the meeting did not take place. While the DCM testified that he told the OC to proceed with the meeting, he provided no detail about this conversation he had with the OC nor did he have any knowledge of whether the meeting took place.

By email dated November 10, 2009, the OC wrote to the DCM, the Outbound Supervisor, and the HR Administrator that he set up a tailgate and that he “also explained to [an employee](alone) that he was witnessed on camera doing an unsafe act and that tomorrow when he arrives we would sit with [the HR Administrator] and discuss his writeup.” The OC testified that this email accurately described the discussion he had with the employee but there was no detail regarding whether the employee received a writeup.

In addition, there is evidence that the OC was present with the Outbound Supervisor, the DCM, and the HR Administrator when discipline was issued to an employee on or about October 5, 2009. There was no further detail regarding this incident and the OC’s involvement. The DCM testified that the OC had been present on about 10 occasions during the last two years when discipline has been given to employees. Aside from what is described herein, the record did not contain any details as to those instances when the OC was present for the issuance of discipline to employees.

The OC wrote two emails on April 2, 2010 to the DCM, the HR Administrator, the

Outbound Supervisor, and the Inbound Supervisor regarding employees' schedules. According to the OC, he acted as a mere conduit of information in communicating via email that he had inputted the changes to the schedule as he was directed to do by the then-Outbound Supervisor.

According to the OC, the former Inbound Supervisor created a schedule of hours for the inbound employees, and the former Outbound Supervisor created the schedule for the outbound employees. The OC stated that he can make recommendations as to whether he thinks that an "employee will be able to handle that, but they basically make their own decision." Supervisors determine break and lunch time. On the occasions when somebody is needed to work through lunch or late, this must be approved by supervisors. If an employee calls out sick, the OC is supposed to send an email to supervisors and managers to let them know. The OC testified that he does not have the authority to transfer employees but can suggest a transfer. The record contained no additional detail regarding how the OC suggests a transfer. The DCM testified that coordinators can request temporary transfers of employees but did not offer any examples of coordinators having done so.

The Vice President of Operations ("the Operations VP") oversees product quality, food safety, logistics, and transportation for Driscoll; he reports to the Senior Vice-President of Supply and Operations. As part of his job, the Operations VP visits the various Driscoll facilities. In an April 7, 2010 visit to the Santa Maria Facility, he noticed some damaged pallets. Upon seeing these damaged pallets, he told the OC to help with the damaged pallets. The OC remarked "that's bad. This needs to be taken care of." The Operations VP asked the OC if he could handle it. The OC responded "don't worry, boss, I will take care of it," and started directing people over to get the pallets restacked. The OC instructed two forklift drivers to come over and told them, "we can't send this type of product out to our customers. We need to get it taken care of." The Operations VP did not give the OC any direction or suggestion about what he needed to do to fix

the problem because “[i]t was pretty obvious.”²⁹

I. The Operations/Outbound Coordinator (OpC)

In addition to the OC, the Employer employs an Operations/Outbound Coordinator (“the OpC”). The OpC reports to the DCM and is an hourly employee. The employee holding the position of the OpC had been on a leave of absence with a return to work date of April 12, 2010: he was scheduled to work from 1 p.m. to 11 p.m. During the three hours each day when the OC and the OpC overlap, the OC “will take over” or will oversee the shipping while the OpC concentrates on the tectrolling and loading process. The OpC’s responsibilities are the same as those of the OC; however the OpC also works with the employees who remove the product from the precooling tunnels to the staging area, tectrol area or shipping dock.

When the OpC first gets to work he checks his email for any important information about orders for the day, prints a list of the orders, and checks for any special orders and appointments. He also spends time answering phones, entering appointments, helping employees with the loading of the trucks, and responding to any issues or questions employees may have including questions about order sheets. According to the OpC, employees who unload the trucks and work with the OpC know on a day-to-day basis what they are supposed to do. For example, the OpC will say to the tectrol employees, “[c]an you stack these partial pallets or clean?” The OpC has never disciplined any employees but recalled reporting an incident of employees engaging in horseplay to a supervisor. The OpC was unaware of what action the supervisor took, if any, in response to his report. The OpC does not approve requests for time off nor has he been informed by management that he has the authority to grant time off.

On May 7, 2009, the OpC sent an email to the HR Administrator, the DCM, the then-Outbound Supervisor, and the OC that an employee had a headache and asked to go home and

²⁹ According to the Operations VP, the OC knew his identity.

the OpC “told [sic] it was ok.” According to the DCM, the OpC did not need approval to send this employee home. The record contained no additional evidence regarding whether there are any policies in place which govern when employees are allowed or not allowed to leave work early or whether the OpC had been told he had the authority to send a sick employee home early.

J. The March 10, 2010 Meeting

Several witnesses testified regarding a meeting that took place on or about March 10, 2010 which lasted about an hour and a half. The testimony differed regarding certain statements allegedly made by the Director of Human Resources about the duties of the coordinators *vis a vis* the supervisors. Present at this meeting were the Director of Human Resources, the District Manager, the DCM, the HR Administrator, the OpC, the IC, the PC, the OC, the then-Outbound Supervisor, and the then-Inbound Supervisor.³⁰

The meeting started with the Director of Human Resources saying that this was the coordinator/supervisor kickoff meeting for the year. The Director of Human Resources encouraged the coordinators and supervisors to follow the proper chain, meaning that staff under coordinators were to go to the coordinators with issues, coordinators to the supervisors, supervisors to management, and management to the district manager. The Director of Human Resources said that if the employee felt that the issue was not being addressed, the employee could take it to the next level.

According to the OC, at the meeting he said that he had asked the Director of Human Resources for help with the way things were being run in Santa Maria and he complained about the lack of leadership by supervision and that coordinators were expected to do supervisors’ jobs

³⁰ Some of the witnesses did not recall the OpC being present, but the OpC testified that he was present at this meeting.

when they were not recognized as supervisors.³¹ The Director of Human Resources responded that the supervisors were going to be handling their own business amongst themselves and HR and that the coordinators would be coordinators now and not supervisors. The OC testified that the Director of Human Resources stated that the coordinators “are not supervisors. [They] are not required to do what the supervisor does. [They] are coordinators and [they] need to handle that title accordingly.”³²

The District Manager denied that anything was said at this meeting regarding coordinators not being supervisors or that there was any discussion about the coordinators’ supervisory status at this meeting or any mention of a change in job responsibilities. According to the HR Administrator nothing was said about coordinators not being supervisors, or that they are not to act as supervisors.

K. The DCM’s Meeting with the Shop Steward

Sometime in the May 2009, the steward spoke with the DCM about discipline issued to a particular employee. According to the steward, the employee had reported to him that a coordinator had written him up. The steward requested a meeting with the DCM because it was his understanding that the coordinator could not “write [him] up because he’s not a supervisor.” The steward met with the DCM and asked the DCM if he was aware that coordinators are not able to give write-ups. The DCM responded that he knew. The DCM denied telling the steward

³¹ At the end of 2009, the OC spoke with the HR Administrator and the Employer’s safety officer and employee relations manager (“the safety officer”) at a meeting at the Radisson Hotel. The OC told the safety officer that the coordinators were having to take job duties that are usually required of a supervisor but that they were not able to discipline employees or change employees’ schedules, that the coordinators were taking on the supervisors’ responsibilities and management was not holding them accountable for it. There was no additional detail in the record regarding this conversation. After this conversation, in December 2009, the OC spoke to the Director of Human Resources and asked him for help in resolving issues with supervision. The OC asked that the Director of Human Resources give him the title or make the supervisors step into their roles and take leadership. The Director of Human Resources responded that he would check into it and get back to the OC. There is no evidence in the record regarding what happened next.

³² The OpC did not testify regarding the statements about coordinators’ responsibilities.

in a meeting in 2009 that coordinators were not empowered to issue warning notices and that coordinators were not considered supervisors by the company.

III. ANALYSIS AND CONCLUSIONS

A. Statutory Supervisory Indicia

The issue in this case is whether four coordinators are supervisors within the meaning of the Act. The Employer contends that the IC, the PC, the OC, and the OpC are supervisors within the meaning of the Act. The Union disagrees. The Board recognizes that it must not construe supervisory status too broadly because employees who are deemed to be supervisors are denied rights provided to employees in the Act. *Regal Health and Rehab Ctr., Inc.*, 354 NLRB No. 71, slip op. at 6 (2009). Thus, the party asserting supervisory status carries the burden of proving supervisory status. *Id.*, slip op. at 6. Any lack of evidence in the record is construed against the party asserting supervisory status. *Regal Health and Rehab Ctr., Inc.*, slip op. at 17. Moreover, “purely conclusory” evidence is not sufficient to establish supervisor status; rather a party must present evidence that the employee “actually possesses” the Section 2(11) authority at issue. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

Section 2(11) of the Act defines the term supervisor as follows:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As emphasized by Congress, only truly supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, setup men and other minor supervisory employees.” *East Buffet and Restaurant, Inc.*, 352 NLRB 975, 991 (2008). An individual will only be found to be a supervisor if his exercise of the supervisory authority is “not of a merely routine or clerical nature, but requires the use of independent

judgment” and his authority is held “in the interest of the employer.” *See Regal Health and Rehab Ctr., Inc.*, slip. op. at 6. Finally, an individual “need only possess one of the enumerated indicia of authority in order to be a statutory supervisor” where that authority is “carried out in the interest of the employer and requires the use of independent judgment.” *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1115 (2007).

B. The Inbound Coordinator

The Employer claims that the Inbound Coordinator is a statutory supervisor, assertedly because: he assigns and responsibly directs work; effectively recommends disciplinary action; may effectively recommend promotions; and because secondary indicia support the IC’s supervisory status. I am unable to conclude from the record whether the IC has supervisory authority within the meaning of Section 2(11). Although the Employer has not met its burden of establishing that the IC is a supervisor within the meaning of the Act, I note that ambiguity in the record evidence precludes a definitive determination at this point. Accordingly, I will allow the IC to vote subject to challenge.

While the evidence does not support the Employer’s assertion that the IC possesses certain of the alleged supervisory indicia, the evidence does suggest that he may have the authority effectively to recommend and/or discipline employees, and secondary indicia also support the IC’s possible supervisory status.

1. The Inbound Coordinator Does Not Assign or Responsibly Direct Work

In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), the Board defined “assign” to mean “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks to an employee. The Board explained that assigning an employee to a department (e.g., housewares), shift (e.g., night), or certain significant overall duties (e.g., restocking shelves),

qualifies as “assigning” work under the Board’s definition, but choosing the order in which employees perform discrete tasks within those assignments (e.g., restocking toaster before coffeemakers) is not indicative of exercising the authority to assign.

In asserting that the IC assigns within the meaning of Section 2(11) of the Act, the Employer relies on evidence that the IC “assigns the forklift drivers in the receiving area to offload product from specific trucks and deliver it to the QA station . . . he assigns another driver, at his discretion, to do the same work” when a driver leaves for the day, and when several trucks arrive at the same time either the IC or the Inbound Supervisor directs employees to assist in the receiving area. The record fails to establish that the IC assigns employees to a department, shift, or significant overall duties. To the extent that the IC may direct other available employees to assist in the receiving area when product is backed up, there is no evidence that the IC uses independent judgment in his selection of employees to assist in the receiving area. In fact, the employees’ duties are well-known and routine and the record evidence does not establish that it is necessary for the IC to consider the relative skills or strengths of the employees trained on a particular task. Based on the above, I find that the IC does not assign employees within the meaning of Section 2(11).

The Employer also asserts that the IC responsibly directs employees. Under *Oakwood*, for direction to be responsible:

the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.

Oakwood at 692. Accountability in the context of responsible direction is established where the putative supervisors have the authority to direct work and the authority to take corrective action, if necessary, and face adverse consequences for failing to take appropriate corrective action. The asserted supervisor must be subject to discipline or other adverse consequences because of the

failure of his crew to meet production goals or because of other shortcomings of his crew. *Croft Metals*, 348 NLRB 717, 722 (2006). As for the Employer's reliance on the IC's responsibility for ensuring the Employer's "inbound cycle time," the record provides no details in support of this conclusion.

Even assuming *arguendo* that the IC directs employees' work, there is no evidence that the IC is held accountable for the work of the employees he oversees. Thus, I find that the IC does not responsibly direct employees within the meaning of the Act.

2. The IC Does Not Effectively Recommend Promotions

The Employer asserts that the IC has the authority to recommend that employees in the classification of floor help be promoted to the position of forklift driver and on two occasions coordinators have made recommendations for promotions that were accepted. The record contains no specific evidence regarding the IC's effective recommendation of promotion. The Board has held that a party does not meet the burden of establishing supervisory status where "the testimony is utterly lacking in specificity." *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). On this basis, there is insufficient evidence to establish that the IC effectively recommends promotions.

3. The IC May Effectively Recommend and/or Discipline Employees

The record reveals that in May 2009, the IC instructed an employee how to better complete a task. When the employee failed to comply with his instruction, the IC reported the situation to the supervisor, who responded "Okay, go ahead and write him up." The IC then spoke to the HR Administrator who gave the IC a form and told him how to fill it out. The employee was, shortly thereafter, given a write up at a meeting attended by the IC, the supervisor, the DCM, the HR Administrator, and the employee. The record thus established that as a result of the IC's conversation with the supervisor, the employee was ultimately "written up"

with no evidence that the supervisor engaged in an independent investigation of the employee's conduct. However, the record does not reveal whether the IC recommended that disciplinary action be imposed, or rather just reported the incident to the DCM, who determined that discipline was appropriate. In these circumstances I am unable to conclude whether the IC "effectively recommended" discipline.

I therefore find that the evidence is ambiguous as to whether the IC has the authority effectively to recommend discipline of employees within the meaning of Section 2(11) of the Act.

4. The Secondary Indicia Support the IC's Supervisor Status

In light of my determination that the IC may exercise at least one Section 2(11) supervisory indicia, I will review the secondary indicia evidence, which is considered only if there are 2(11) indicia present. *RCC Fabricators, Inc.*, 352 NLRB 701, fn. 28 (2008); *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114 (2007). The Employer cites as secondary indicia that the IC is paid a higher hourly wage than the existing unit employees. I note that the record only contains generalized testimony that the coordinators earn more than other employees; there is no specific evidence regarding the IC's hourly wage. The IC is eligible for a bonus along with supervisors and managers; bonuses are not available to employees below the coordinator classification. The evidence established that all coordinators earned bonuses for 2009 but did not distinguish which of the disputed classifications or the non-disputed coordinator classifications received bonuses. I also note that the record contains no evidence of how the bonuses are awarded to the coordinators. The record includes evidence that the IC as well as other coordinators attend weekly staff meetings held by management and attended by undisputed supervisors, that the IC has attended trainings attended by supervisors where the topics of sexual harassment and motivating employees have been addressed, that the IC is the designated safety

coordinator for the Facility, and that the IC received a copy of “Driscoll’s Standards of Conduct,” which is not provided to the employees the IC oversees. In considering that the IC may be a supervisor based on his authority effectively to recommend discipline, I find that the secondary indicia supports a determination that the IC may be a supervisor within the meaning of Section 2(11) of the Act.

5. Finding

Based on the above analysis, I find that there is insufficient evidence to establish whether the IC is a supervisor within the meaning of Section 2(11),³³ and therefore I will permit him to vote subject to challenge.

C. The Packaging Coordinator

The Employer asserts that the Packaging Coordinator is a statutory supervisor for the following reasons: he assigns a forklift driver; responsibly directs the forklift driver; may effectively recommend promotions; and because secondary indicia establish that he is a supervisor.

For the reasons set forth below, I find that the Packaging Coordinator is not a supervisor within the meaning of Section 2(11) of the Act.

1. The PC Does Not Assign Employees

The Employer asserts that the PC assigns work and is therefore a supervisor. The record establishes that the PC works with a forklift driver to distribute packaging supplies to field drivers and that he tells the forklift driver how much merchandise to place on the field drivers’ trucks. The PC also receives packaging materials from vendors and tells the same forklift driver to offload materials and where to place the materials within the Facility. The record fails to

³³ The Employer does not assert and I do not find that the IC has the authority to hire, transfer, suspend, layoff, recall, discharge, reward, adjust employee grievances, or effectively to recommend such action.

establish that the PC's oversight of employees involves the exercise of independent judgment; rather, the record establishes that the PC's oversight is routine and clerical.

The PC testified that he does not have the authority to grant overtime and the DCM's testimony regarding this authority was conclusory and included no details such as whether the PC directs selected employees to work overtime or merely seek volunteers. The evidence establishes that the employees with whom the PC works have their schedules set by the Inbound Supervisor and that their schedules include designated times for lunch and breaks. There is no evidence that the PC designates employees to a department, that he appoints employees to a time, or that he assigns overall duties to an employee: he merely relays the amount of materials to be received and shipped and where to place those materials. Thus, I find that the PC does not assign employees within the meaning of Section 2(11).

2. The PC Does Not Responsibly Direct Employees

There is no evidence that the PC is held accountable for the work of the employees he oversees. Based on this absence of accountability, I find that the PC does not responsibly direct employees. I note that there is no evidence in the record to establish that the PC uses independent judgment in his oversight of employees to move packaging materials in and out of the Facility. In fact, the record establishes that the employees with whom the PC works perform the same job or repetitive tasks on a regular basis and require minimal guidance such that any oversight by the PC is routine or clerical. The evidence that the PC showed employees at the Jalisco, Mexico facility the processes followed at the Driscoll plant in Santa Maria, does not establish that the PC responsibly directed employees. Thus, I find that the PC does not responsibly direct employees.

3. The PC Does Not Effectively Recommend Promotions

While the record includes conclusory statements from the DCM regarding recommendations made by coordinators for promotions, there is no evidence specific to the PC

that he has the authority effectively to recommend promotions. I find that the Employer has failed to meet its burden to establish that the PC has the authority effectively to recommend promotions as the evidence it presented was merely conclusory.

4. The Secondary Indicia Do Not Establish that the PC is a Supervisor

To the extent the Employer relies on secondary indicia to argue the supervisory status of the PC, I note that, where the individuals in question do not possess any of the statutory indicia enumerated in Section 2(11) of the Act, the secondary indicia are insufficient to establish supervisory status. *Talmadge Park, Inc.*, 351 NLRB 1241, 1245 (2007). Secondary indicia may be used as background evidence to bolster the existence of supervisory status, but are not dispositive absent evidence supporting the existence of one of the statutory indications of supervisory status. *See Avante at Wilson, Inc.*, 348 NLRB 1056, 1061 (2006).

I therefore find it unnecessary to evaluate these factors given the absence of evidence establishing any one of the primary indicia of supervisory status.

5. Finding

Based on the above analysis, I find that the PC classification is not supervisory within the meaning of Section 2(11).³⁴

D. The Outbound Coordinator

The Employer asserts that the OC is a statutory supervisor for the following reasons: he assigns employees; responsibly directs employees; has the authority effectively to recommend discipline; has the authority effectively to recommend promotions; has the authority effectively to recommend the recall of employees; and because secondary indicia establish that the OC is a statutory supervisor. I note that ambiguities in the record evidence preclude a definitive

³⁴ The Employer does not assert and I do not find that the PC has the authority to hire, transfer, suspend, layoff, recall, discharge, reward, adjust employee grievances, or effectively to recommend such action.

determination at this point. Accordingly, I will allow the OC to vote subject to challenge.

1. The OC Does Not Assign or Responsibly Direct Employees

The Employer asserts that the OC directs employees on the tectrol team to move product from the tunnels or staging areas, that he ensures that tectrol is applied properly, that he schedules employees' breaks, and authorizes overtime as necessary.

As described *supra*, assignment within the meaning of the Act involves “designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks to an employee. The record neither establishes that the OC designates employees to a place, nor that the OC gives significant overall duties to employees. As for appointing employees to a time, while the OC is involved in the scheduling of employees, there is no evidence that he assigns them to shifts; rather, he occasionally may instead give them their start time for the day shift. The evidence regarding the OC’s authority to assign overtime is conclusory, lacks specificity and is denied on the record by the OC himself. Based on the lack of specificity with respect to the OC’s assignment of overtime as well as a lack of evidence regarding independent judgment exercised by the OC in scheduling or assigning overtime, I find that the OC does not assign employees within the meaning of the Act.

I find that the OC does not responsibly direct employees based on the lack of evidence establishing that the OC is held responsible for the work of those he oversees. Under *Oakwood*, for direction to be responsible, the individual doing the oversight must be held accountable for the work he/she oversees. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). The evidence does not establish that the OC is held accountable for the work of those he oversees. Rather, upon being asked by the Hearing Officer for “examples of how [the OC] would become accountable for not doing his job responsibilities,” the DCM responded “[t]here was only one occasion that I

can remember that the job was done incorrectly and [the OC] received a write-up for that job. Other than that one, pretty much he always completes his tasks very well.” The one example noted in the record is ambiguous as to whether the OC was held responsible for his own inadequate performance or for that of the employees he oversees, and this asserted discipline issued to the OC is not in the record. Even assuming, *arguendo*, that the OC directs the work of employees, I find that the Employer did not meet its burden to establish that the OC is held responsible for the work of those he oversees and, as a result, that he does not responsibly direct employees.

2. The OC Does Not Effectively Recommend Promotions

The record fails to establish with any specificity the OC’s authority effectively to recommend promotions. The record merely contains blanket assertions that coordinators may make recommendations for promotions with no supporting detail. Thus, the record fails to establish that the OC effectively recommends promotions.

3. The OC Does Not Have the Authority Effectively to Recommend the Recall of Employees

The DCM testified that he has decided not to recall four or five employees without seniority based on the recommendation of the OC. In response to the question “did you do anything to check behind his recommendation or did you do your own investigation before you accepted it,” the DCM testified “[g]enerally I don’t.” The record therefore fails to establish with any detail the process by which the OC recommends employees for recall. Further, the record fails to establish that the Employer has communicated to the OC that he has the authority to make effective recommendations for the recall of employees. *See e.g., American Directional Boring, Inc.*, 353 NLRB No. 21, slip op. at 61 (2008) (the Board considers evidence of whether a putative supervisor has been told that she has authority in determining supervisory status); *Loyalhanna Health Care Associates*, 352 NLRB 863, 870 (2008). Rather, the OC’s testimony on

this point is that the coordinators “put our input on what we thought of the people being recalled, where they would be best positioned. We were asked our opinion if they should be an outbound or an inbound.” I find the OC does not have the authority effectively to recommend recall of employees based on the lack of detail and specificity contained in the record.

4. The OC May Effectively Recommend and/or Discipline Employees

Although there is some evidence which suggests that the OC is a supervisor, I find lack of detail in the record precludes my finding that the OC is a supervisor within the meaning of Section 2(11) of the Act. The evidence establishes that on June 30, 2009, the OC sent an employee home when the employee “gave [him] a smart answer.” While the authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority, the instant record does not enable me to make a determination that the OC is a supervisor. *E.g., Silver Metal Products*, 244 NLRB 25, 28 (1979). The record fails to establish whether the OC was told that he has the authority to discipline employees or whether employees were told that he had the authority to discipline them. *Cf. Bredero Shaw*, 345 NLRB 782, 783 (2005). I also find that the record is insufficient to make a finding that the OC used independent judgment in sending the employee home. With respect to the OC’s communication to an employee that he had witnessed the employee doing an unsafe act and that they would discuss his writeup the following day, there is no evidence regarding whether the OC either recommended discipline or merely reported the employee’s conduct or whether discipline was ultimately issued.

5. Secondary Indicia Indicate that the OC is a Supervisor

To the extent the Employer relies on secondary indicia to argue the supervisory status of the OC, I note that, where the individuals in question do not possess any of the statutory indicia enumerated in Section 2(11) of the Act, the secondary indicia are insufficient to establish

supervisory status. *Talmadge Park, Inc.*, 351 NLRB 1241, 1245 (2007). The Employer cites as secondary indicia that the OC is paid a higher hourly wage than the existing unit employees. As with the IC, I note that the record only contains generalized testimony that the coordinators earn more than other employees; there is no specific evidence regarding the OC's hourly wage. The OC is eligible for a bonus along with supervisors and managers; bonuses are not available to employees below the coordinator classification. The evidence established that all coordinators earned bonuses for 2009 but did not distinguish which of the disputed classifications or the non-disputed coordinator classifications received bonuses. I also note that the record contains no evidence of how the bonuses are awarded to the coordinators. The record includes evidence that the OC as well as other coordinators attend weekly staff meetings held by management and attended by undisputed supervisors, that the OC has attended trainings attended by supervisors, and that the OC in 2009 worked without a supervisor at the Facility for about a half day each shift for about a year, and currently works for about six hours a day without a supervisor present. I find that the secondary indicia tend to indicate the OC's possible supervisory status but are insufficient to establish supervisory status.

6. Finding

Based on the above analysis, I will allow the OC to vote subject to challenge.³⁵

E. The Operations/Outbound Coordinator

The Employer asserts that the OpC is a statutory supervisor for the following reasons: he assigns and responsibly directs employees; he may effectively recommend promotions; and because secondary indicia support the OpC's supervisory status. I find that the OpC is not a supervisory classification within the meaning of the Section 2(11).

³⁵ The Employer does not assert and I do not find that the OC has the authority to hire, transfer, suspend, layoff, discharge, reward, adjust employee grievances, or effectively to recommend such action.

1. The OpC Does Not Assign or Responsibly Direct Employees

The record fails to establish that the OpC assigns employees. There is no evidence that the OpC designates employees to a department, that he appoints employees to a time, or that he assigns overall duties to an employee. The evidence with respect to the OpC's authority to authorize overtime was conclusory; it included no details with respect to his actually having or exercising this authority. The Board has held that a party does not meet the burden of establishing supervisory status where "the testimony is utterly lacking in specificity." *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

The Employer's assertion that the OpC has the authority to allow employees to leave work early is based on a single email from the OpC in which the OpC wrote that he told an employee it was ok to go home when the employee said he had a migraine headache and was dizzy. Such evidence is not sufficient to establish supervisory authority. The Board has held that evidence that an individual acts as a conduit of information from an employee to management is not sufficient to establish supervisory status. While the evidence shows that the OpC allowed a sick employee to go home early, the record fails to reveal any details of the existence or nonexistence of underlying instructions, procedures, or criteria or that the OpC had a choice in whether the employee would leave early. The Board has held that merely accepting notification that employees will not report to work does not show authority to grant or deny time off. *See Starwood Hotels & Resorts*, 350 NLRB 1114, 1127 (2007) citing *Fleming Cos.*, 330 NLRB 277 (1999). The record fails to establish that the OpC exercised independent judgment in sending the employee home, thus, this evidence does not confer upon him supervisory authority and status.

Again, for direction to be responsible, the putative supervisor doing the oversight of an employee must be held accountable for the performance of the task by the other. *See Oakwood at 692*. There is no evidence establishing that the OpC has been held accountable for the work or

performance of any employee he oversees.

2. The OpC Does Not Effectively Recommend Promotions

As with the evidence regarding the OpC's assignment and responsible direction of employees, the record fails to establish with any specificity the OpC's authority effectively to recommend promotions. The record merely contains blanket assertions that coordinators may make recommendations for promotions without citing any supporting detail. Thus, the record fails to establish that the OpC effectively recommends promotions.

3. Secondary Indicia of Supervisory Status Do Not Establish that the OpC is a Supervisor

As stated *supra*, secondary indicia are not sufficient to establish supervisory status where the individual in question does not possess any one of the statutory indicia enumerated in Section 2(11) of the Act. Here, where the Employer asserts that the OpC possesses certain secondary indicia of supervisory status, I find it unnecessary to evaluate these factors given the absence of evidence establishing any one of the primary indicia of supervisory status.

4. Finding

Based on the above analysis, I find that the OpC classification is not supervisory within the meaning of Section 2(11).³⁶

IV. CONCLUSION: On the basis of the foregoing and the record as a whole, I find that the PC and OpC are not supervisors within the meaning of the Act and are therefore included in the Voting Group. Since I am unable to determine based on the evidence whether the IC and OC are supervisors, I will permit them to vote subject to challenge. Further, I find that the Voting Group is an appropriate voting group. If a majority of the valid votes in the election are cast for Petitioner, the employees in the Voting Group will be deemed to have indicated their desire to be

³⁶ The Employer does not assert, nor do I find that the OpC has the authority to hire, transfer, suspend, layoff, recall, discharge, reward, adjust employee grievances, or effectively to recommend such action.

represented by Petitioner and to be included in the existing unit currently represented by Petitioner, and Petitioner would then bargain for those employees as part of that unit. In such an event, the following unit would be appropriate for purposes of collective bargaining:

INCLUDED: Floor help, seasonal floor help, fork lift warehousepersons, maintenance, coordinators, quality assurance inspectors, shipping clerks, auditors, and samplers employed by the Employer at its Santa Maria, California Facility.

EXCLUDED: Office clerical employees, professional employees, guards, and supervisors as defined in the Act.

If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented, and I will issue a certification of results of election to that effect.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the Voting Group found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Union Local 381. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the Voting Group who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well

as their replacements are eligible to vote. Employees in the Voting Group who are in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the **full** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 31 Regional Office, 11150 W. Olympic Boulevard, Suite 700, Los Angeles, California 90064-1824, on or before **June 2, 2010**. No extension of time to file this list will be granted except in extraordinary

circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website, www.nlr.gov,³⁷ by mail, by hand or courier delivery, or by facsimile transmission at (310) 235-7420. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

³⁷ To file the eligibility list electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Regional, Subregional and Resident Offices and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 9, 2010**. The request may be filed electronically through the Agency's web site, www.nlr.gov,³⁸ but may not be filed by facsimile.

DATED at Los Angeles, California this May 26, 2010.

/s/ James J. McDermott

James J. McDermott, Regional Director
National Labor Relations Board
Region 31

³⁸ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.